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Lee Chang Yong v Teng Wai Yee

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HIGH COURT (SHAH ALAM) — DIVORCE PETITION NO 33–306–05 OF 2016
HAYATUL AKMAL JC
10 OCTOBER 2018

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Civil Procedure — Proceedings — Divorce petition — Full trial of divorce petition completed — Application for stay order against court's decision — Whether issues raised by petitioner constituted special circumstances for grant of stay — Application to cross-examine respondent's affidavits — Whether there was necessity for respondent to be cross-examined — Application for committal proceeding against respondent — Whether petitioner satisfied burden of proof concerning petitioner's allegations against respondent

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Family Law — Divorce — Petition — Full trial of divorce petition completed — Petitioner filed appeal against part of decision — Application for stay order against court's decision — Whether issues raised by petitioner constituted special circumstances for grant of stay — Application to cross-examine respondent's affidavits — Whether there was necessity for respondent to be cross-examined — Application for committal proceeding against respondent — Whether petitioner satisfied burden of proof concerning petitioner's allegations against respondent

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The full trial of the divorce petition between the petitioner husband ('the petitioner') and the respondent wife ('the respondent') had been completed where the decision of the court was delivered on 27 April 2018 ('the said decision'). Subsequently, the petitioner had filed the following applications via summon-in-chambers: (a) stay order on the said decision pending the disposal of the appeal filed by the petitioner against part of the decision ('encl 191'); (b) cross-examination of the respondent's affidavit affirmed on 6 April 2018 or any affidavit which were to be used for the hearing of a committal proceeding filed by the petitioner against the respondent ('encl 203'); and (c) committal order against the respondent with a view for her to be committed to prison for alleged failure to comply with the interim order dated 6 June 2016 ('the said order') ('encl 169'). In respect of encl 169, the petitioner alleged that: (i) the two children were taken by the respondent to the mosque for prayers during Raya ie on 25 June 2017; (ii) the respondent had caused the daughter to wear hijab on 25 June 2017; and (iii) the respondent had failed to allow access by electronic communication from 7–8pm on 7 July 2017 and 14 October 2017 ('the allegations').

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Held, dismissing encls 169, 203 and 191 with no order as to costs:

(1) It was trite law that the court had the absolute and unfettered discretion to grant stay of execution if there were special circumstances and it was also trite that an appeal to the Court of Appeal did not constitute special circumstances for granting stay. The issues raised by the petitioner regarding the merits of the appeal did not constitute special circumstances. Regarding the matrimonial home, the issue of nugatory did not arise because by the court's decision, the petitioner held 50% undivided share of the matrimonial home and he was given the option to purchase the respondent's 50% undivided share in the said property. Based on the above finding, the petitioner had failed to raise any issue that amounted to special circumstances needed for the stay application (see para 22).

(2) The petitioner did not identify which averment or factual disputes in the affidavit evidence of the respondent that the petitioner sought to challenge that warranted the cross-examination of the respondent. Further, the respondent could be cross-examined during the hearing of the committal proceeding. Therefore, there was no necessity for the respondent to be cross-examined at this stage of the proceeding (see para 25).

(3) The petitioner had not been able to adduce any pertinent material of probative value to prove his allegations and consequently, such omission would impair the satisfaction of the required burden of proof imposed on the petitioner concerning the allegations against the respondent. The conversation the petitioner had with his children were referring to the incident in 2016 and not 2017. Further, the petitioner could not rely on the said conversation because the rule of evidence required that there must be corroboration with evidence of child of tender years. In addition, the repetitious way the petitioner had asked the children could be safely considered as coaching the children in regard to the issue as contained the said question. In any event, the children had denied that they went to the mosque. The fact that the children were not with the respondent during Raya 2017 was not cross-examined further, thus, it was deemed accepted as the truth (see para 28).

[Bahasa Malaysia summary

Perbicaraan penuh petisyen perceraian antara pempetisyen suami ('pempetisyen') dan responden isteri ('responden') telah selesai di mana keputusan mahkamah telah disampaikan pada 27 April 2018 ('keputusan tersebut'). Berikutan itu, pempetisyen itu telah memfailkan permohonan berikutnya melalui saman dalam kamar: (a) perintah penggantungan berhubung keputusan tersebut sementara menunggu selesai rayuan yang difailkan oleh pempetisyen terhadap sebahagian keputusan tersebut

('lampiran 191'); (b) pemeriksaan balas afidavit responden yang disahkan pada 6 April 2018 atau mana-mana affidavit yang akan digunakan untuk perbicaraan prosiding komital yang difailkan oleh pempetisyen terhadap responden ('lampiran 203'); dan (c) perintah komital terhadap responden dengan tujuan agar dia dijatuhkan hukuman penjara kerana kegagalan yang dikatakan untuk mematuhi perintah interim bertarikh 6 Jun 2016 ('perintah tersebut') ('lampiran 169') Berhubung lampiran 169, pempetisyen mengatakan bahawa: (i) dua orang anak-anak itu telah diambil oleh responden ke masjid untuk solat semasa Raya iaitu pada 25 Jun 2017; (ii) responden telah menyebabkan anak perempuannya memakai hijab pada 25 Jun 2017; dan (iii) responden telah gagal dibenarkan akses melalui komunikasi elektronik dari 7–8 malam pada 7 Julai 2017 dan 14 Oktober 2017 ('dakwaan tersebut').

Diputuskan, menolak lampiran-lampiran 169, 203 dan 191 tanpa perintah untuk kos:

(1) Ia adalah undang-undang lapuk bahawa mahkamah mempunyai budi bicara mutlak dan tidak terkawal untuk membenarkan penggantungan pelaksanaan jika terdapat keadaaan istimewa dan ia juga lapuk bahawa suatu rayuan kepada Mahkamah Rayuan tidak membentuk keadaan istimewa untuk membenarkan penggantungan. Isu-isu yang timbul oleh pempetisyen berkaitan merit rayuan tidak membentuk keadaan istimewa. Berhubung rumah sepencarian, isu *nugatory* tidak timbul kerana keputusan mahkamah, pempetisyen memegang 50% daripada syer yang tidak dibahagikan ke atas rumah sepencarian dan dia telah diberikan pilihan untuk membeli 50% daripada syer yang tidak dibahagikan dalam hartanah tersebut. Berdasarkan dapatan di atas, pempetisyen telah gagal untuk menimbulkan apa-apa isu yang merupakan keadaan istimewa yang perlu untuk permohonan penggantungan (lihat perenggan 22).

(2) Pempetisyen tidak mengenal pasti penegasan atau pertikaian faktual dalam afidavit keterangan responden yang mana pempetisyen mohon untuk dicabar yang mewajarkan pemerikasaan balas responden. Selanjutnya, responden boleh diperiksa balas semasa perbicaraan prosiding komital. Oleh itu, tiada keperluan untuk responden diperiksa balas di peringkat prosiding ini (lihat perenggan 25).

(3) Pempetisyen tidak dapat mengemukakan apa-apa nilai *probative* material yang kukuh untuk membuktikan dakwaannya dan akibat itu, peninggalan tersebut telah menjejaskan beban bukti yang dikehendaki untuk dipenuhi yang dikenakan ke atas pempetisyen berkaitan dakwaan tersebut terhadap responden. Perbualan pempetisyen dengan anak-anaknya dirujuk sebagai kejadian pada 2016 dan bukan 2017. Selanjutnya, pempetisyen tidak boleh bergantung kepada perbualan tersebut kerana rukun keterangan menghendaki perlu ada sokongan

keterangan anak di bawah umur. Selain itu, cara pempetisyen berulang kali bertanya kepada anak-anaknya dengan selamat boleh dianggap sebagai melatih anak-anaknya berkaitan isu yang terkandung dalam persoalan tersebut. Dalam apa keadaan, anak-anaknya telah menafikan bahawa mereka telah ke masjid. Fakta bahawa anak-anak tersebut bukan bersama responden semasa Raya 2017 tidak diperiksa balas selanjutnya, oleh itu, ia dianggap telah diterima sebagai benar (lihat perenggan 28).]

Notes

For cases on petition, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4381–4392.

For cases on proceedings in general, see 2(4) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 8219–8241.

Cases referred to

Emporium Jaya (Bentong) Sdn Bhd v Emporium Jaya (Jerantut) Sdn Bhd (No 2) [2002] 5 MLJ 675; [2002] 3 CLJ 10, HC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49; [2002] 3 CLJ 380, CA (refd)

Perera v R [1951] AC 482, PC (refd)

Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd [2007] 4 MLJ 638; [2007] 4 CLJ 48, CA (refd)

Univein Sdn Bhd v Malaysia Building Society Bhd [2003] 4 MLJ 618, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 13

Evidence Act 1950 s 58

Federal Constitution art 126

Rules of Court 2012 O 38 r 2, O 45 r 7(4), O 52 rr 2, 3, 6(4), O 92 r 4, Form 107

Honey Tan Lay Ean (Wong Chong Ee with her) (Tan & Partners) for the petitioner.
Shahrul Nizam bin Azwir (Rohani bt Ibrahim with him) (Shahrul & Rohani) for the respondent.

Hayatul Akmal JC:

INTRODUCTION

[1] There are three separate notices of appeal filed by the petitioner husband ('PH') against this court's decisions. Since these three notices of appeal filed involved the same subject matter and similar facts, I will only prepare a single judgment to avoid duplicity:

(a) encl 191 (stay application)

This is an application via summon-in-chamber filed by PH seeking a stay order on the decision of this court (after a full trial) dated 27 April 2018 pending the disposal of the appeal filed by PH against part of the said decision.

(b) encl 203 (cross-examination of RW's affidavit/s)

This is an application via summon-in-chamber filed by PH seeking the cross-examination of respondent wife's ('RW') affidavit affirmed on 6 April 2018 or any affidavit which will be used for the hearing of a committal proceeding (encl 169) filed by PH against RW.

(c) encl 169 (committal proceeding)

This is an application via summon-in-chamber filed by PH for committal order against RW with a view for her to be committed to prison for alleged failure to comply with paras 2(b), 3 and 7 of the interim order dated 6 June 2016 ('the said order') granted by this court, until she purges her contempt and cost of RM15,000 to be paid within seven days from the date of the order thereof.

[2] The relevant cause papers and written submissions, are as follows:

(a) encl 191 (stay application)

(i) encl 191: application for stay dated 16 May 2018;

(ii) encl 192: PH's affidavit in support affirmed by Lee Chang Yong on 16 May 2018;

(iii) encl 201: PH's additional affidavit affirmed by Lee Chang Yong on 4 June 2018;

(iv) encl 206: RW's affidavit in reply affirmed by Teng Wai Yee on 1 June 2018;

(v) encl 211: PH's affidavit in reply affirmed by Lee Chang Yong on 28 June 2018;

(vi) encl 218: PH's additional affidavit affirmed by Lee Chang Yong on 13 July 2018;

(vii) encl 219: Notice by the PH of his intention to use his affidavit dated 13 July 2018;

(viii) encl 221: RW's additional affidavit affirmed by Teng Wai Yee on 13 July 2018;

(ix) encl 226: PH's affidavit in reply (2) affirmed by Lee Chang Yong on

17 July 2018; and
submissions/reply filed by PH and RW, respectively.

(b) encl 203 (cross-examination of RW's affidavit/s)

(i) encl 203: RH's application dated 4 June 2018;

(ii) encl 204: PH's affidavit in support affirmed by Lee Chang Yong on 4 June 2018;

(iii) encl 212: RW's affidavit in reply affirmed by Teng Wai Yee on 28 June 2016;

(iv) encl 220: Affidavit in reply affirmed by Lee Chang Yong on 13 July 2018;

(v) encl 234: Notice by PH of his intention to use affidavit dated 1 August 2018; and
submissions/reply filed by PH and RW, respectively.

(c) encl 169 (committal proceeding)

(i) encl 169: RH's application dated 23 February 2018;

(ii) encl 170: PH's affidavit in support affirmed by Lee Chang Yong on 22 February 2018;

(iii) encl 171: Notice to show cause issued to PW

(iv) encl 181: RW's affidavit in reply affirmed by Teng Wai Yee on 6 April 2018;

(v) encl 189: PH's affidavit in reply affirmed by Lee Chang Yong on 2 May 2018;

(vi) encl 213: RW's statement under O 52 r 3 of the ROC 2012 dated 29 June 2018;

(vii) encl 214: Affidavit verifying the facts, affirmed by Teng Wai Yee on 28 June 2018;

(viii) encl 247: Notice by the PH of his intention to use his affidavit dated 6 September 2018; and
submissions/reply filed by PH and RW, respectively.

[3] Enclosure 191 and 203 were heard simultaneously and after perusing the cause papers filed, respective written submissions of the parties, on 2 August 2018 I dismissed the said applications with no order as to cost. As for encl 169, RW gave evidence on oath and after perusing the evidence, cause-papers filed, respective written submissions of the parties, on 7 September 2018 I dismissed

encl 169 with no order as to cost. Dissatisfied, PH had filed these appeals and my reasons are as follows:

BRIEF FACTS

[4] Briefly, PH and RW were legally married on 23 December 2006 and were blessed with two children ('the said children'), a girl name Lee Yi Rou ('the said girl' — 'Rou') born on 23 March 2008 (now 10+ years) and a boy name Lee Xin Jie ('the said boy' — 'Jie') born on 23 September 2012 (now 6+ years). On 17 December 2015, the parties presented a joint petition for divorce resulting in the granting of a decree nisi on 21 January 2016 (which was set aside) and several interim orders were also subsequently issued by this court.

[5] On 6 June 2016, the learned judicial commissioner then, granted an ad interim order by consent ((Lampiran A — (encl 24)) and it is this said interim order the PH alleged that the RW had failed to comply. PH alleges that RW had failed to comply with the said interim order when she (allegedly) brought the said children to a mosque. On 6 February 2018, PH filed an application for leave for committal against RW which was granted by this court on 21 February 2018. Subsequently on 23 February 2018, PH filed this application for committal against RW (encl 169).

SUBMISSIONS BY THE PETIONER HUSBAND AND RESPONDENT WIFE

Enclosure 191 (stay application)

[6] Before I proceed further, it is to be noted that the full trial of this divorce petition had been completed where the decision of the court was delivered on 27 April 2018. RH had filed an appeal against part of the said decision. I was made to understand that the said appeal was heard and disposed of by the Court of Appeal last September 2018 and therefore to my mind, it renders the present stay application (encl 191) to be purely academic. However, since encl 191 was not withdrawn by the PH (appellant), therefore for completeness, I will briefly proceed with my judgment for this present application.

[7] Briefly, RH in his affidavit averred that there are merits in his appeal because there was no evidence by RW to show that PH is not capable of taking care of the said children of the marriage, no clear evidence that RW is entitle to 50% of the matrimonial home and the said decision of this court was not for the best interest of the said children. Learned counsel for PH alluded this court's attention to the decision of Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 which affirmed the decision of *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49; [2002] 3 CLJ 380 where Augustine Paul JCA held as

follows:

> It is therefore clear beyond doubt that there are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one. It is an example of special circumstances. In other words, special circumstances are the genus of which nugatoriness is a species.

[8] Learned counsel further submitted that the best interest of the said children will be in jeopardy if the decision is not stayed because of the change in living arrangement that the said children were used to and prayed that the living arrangement prior to 27 April 2018 be reinstated as those arrangements have shown to have worked out well and be maintained pending the outcome of the appeal in Court Of Appeal and RW has no objection to PH seeing the said children every day. Learned counsel had also submitted that the appeal will be rendered nugatory if the matrimonial home is sold or disposed of and therefore any dealings of the matrimonial home ought to be stayed pending appeal.

[9] Learned counsel for RW submitted that the issues raised in PH's affidavit in support regarding the merits of this appeal does not amount to special circumstances. I was alluded to the case of *Univen Sdn Bhd v Malaysia Building Society Bhd* [2003] 4 MLJ 618 where it was decided that the respondent should not be deprived of the fruit of her litigation. Regarding the matrimonial home, the issue of nugatory does not arise because by the court's decision, PH still holds 50% of the matrimonial home and he is given the option to purchase RW's 50% undivided share in the said property.

Enclosure 203 (cross-examination of RW's affidavits)

[10] This is an application filed by PH to cross-examine the affidavit affirmed by RW dated 6 April 2018 and all RW's subsequent affidavits claiming she is disputing that she had given evidence before this court where she admitted to taking the said children to the mosque during Hari Raya Aidilfitri 2017 and when the notes of proceedings clearly indicated otherwise. PH has no means of ascertaining the truth of the averments contained in the affidavits or the context in which the averments were made. RW's conduct at court and her demeanour will be lost if cross-examination is not allowed. These disputed facts are all facts in issue in respect of encl 169. Consequently, discretion therefore ought to be exercised in favour of allowing RW to be cross-examined. The application in encl 203 is also in consonance with the requirement in O 52 r 2 of the ROC 2012 ('the ROC 2012'), that is to give RW notice to show cause why she should not be held in contempt and encl 203 is also in line with O 52 r 6(4) of the ROC 2012.

[11] In her affidavit in reply dated 28 June 2018, RW vehemently denied all the allegations of contempt levelled against her and the alleged necessity by PH to have RW cross-examined on his allegations. She argued that:

(a) PH had to proof beyond reasonable doubt that RW had breached the ad interim order of 6 June 2016 (encl 17) which he had failed;

(b) RW contended that the alleged date where an offence was committed (taking the children for Raya prayers) could not have happened since 25 June 2017 is not the second day of Raya;

(c) RW further contended that the rule as regards to the admissibility of a child evidence must be observed strictly where PH cannot be allowed absolute liberty to adduce purported conversation between him and the child of tender years. The law demands adherence to it;

(d) a look at the telephone logs and WhatsApp record would clearly show discrepancies in PH story and would show the circumstances to be not what is alleged by PH. There is no truth into allegation that RW had imposed hinderance/prohibition in communication between PH and the said children; and

(e) that the earlier contempt proceeding (encl 160) is different from the contempt proceeding presently before the court (encl 169). In encl 160, RW did admit taking the children to the mosque of which the Court of Appeal found her guilty of contempt for which she was given a stern warning by the Court of Appeal. Whereas for proceeding in encl 169, PH had failed to prove that RW had taken the children to the mosque on the second day of Raya and Rou wearing hijab on 25 June 2017; and

(f) in totality, PH had failed to prove beyond reasonable doubt the charges levelled against RW in encl 169.

Enclosure 169 (committal proceeding)

For convenience I reproduced the charges against RW as follows:

(a) Responden lsteri tidak mematuhi Perenggan 2(b) Perintah tersebut:
Tuduhan Pertama (1)
1. 'Responden lsteri telah membawa Lee Yi Rou (Rou) dan Lee Xin Jie (Jie) (selepas ini Rou dan Jie dirujuk secara kolektif sebagai 'anak-anak itu' di mana berkenaan) ke sebuah masjid pada 25 Jun 2017';
Tuduhan Kedua (2)
2. 'Rou bersembahyang mengikut agama Islam pada 25 Jun 2017';
Tuduhan Ketiga (3)
3. 'Rou memakai tudung pada 25 Jun 2017 semasa Hari Raya Aidilfitri 2017';

(b) Responden lsteri tidak mematuhi Perenggan 3 Perintah tersebut:
Tuduhan Keempat (4)
4. 'Responden membawa Rou dan Jie ke sebuah masjid pada 25 Jun 2017 semasa Hari Raya Aidilfitri 2017';
Tuduhan Kelima (5)
5. 'Rou bersembayang mengikut agama pada 25 Jun 2017 semasa Hari Raya Aidilfitri 2017';

(c) Responden lsteri tidak mematuhi Perenggan 7 Perintah tersebut:
Tuduhan Keenam (6)
6. 'Apabila anak-anak itu bersama Responden, Pempetisyen tidak diberi akses melalui telefon dalam lingkungan dari pukul 7 malam sehingga 8 malam pada 7 Julai 2017'; and
Tuduhan Ketujuh (7)
7. 'Apabila anak-anak itu bersama Responden, Pempetisyen tidak diberi akses melalui telefon dalam lingkungan dari pukul 7 malam sehingga 8 malam pada 14 Oktober 2017'.

[12] Learned counsel for PH argued that RW had admitted under oath to committing charges 1 and 4 more than once. On 16 August 2018, RW had also raised new fact that she went to the mosque during Raya 2017 with her neighbour, Kak Ana and not the children. Contemporaneous evidence produced in encl 240 showed that the children were with her until 25 June 2017, after dinner of the second day of Raya 2017. RW's averment that charge 4 is a repetition of charge 1 is misconceived. It remains true that RW has contravened both paras 2(b) and (3) of the said order by bringing the said children to the mosque.

[13] For charges 6 and 7, learned counsel for PH submitted that encl 181, paras 12–13 amounts to an admission. Regardless of the alleged reasons, it remains true that the PH was not given access through the phone from 7pm until 8pm on 7 July 2017 and 14 October 2017, respectively. Section 58 of the Evidence Act 1950 applies and RW's alleged reasons are irrelevant as to whether she is guilty of contempt. If any, they only go towards mitigating the sentence.

[14] Learned counsel argued that the fives charges filed against RW was based on the evidence of RW during the trial proper of this petition based on the exhibits below:

(i) Eksibit 'LCY-Comm2018-2' iaitu rakaman video perbualan di antara anak lelaki Pempetisyen dan Responden yang dirakam pada 29/6/2017 berdurasi selama 4.46 (4 min 46 saat).

(ii) Eksibit 'LCY-Comm2018-3' iaitu rakaman video perbualan di antara Anak-anak tersebut bersama Pempetisyen yang dirakam pada 1/7/2017

berdurasi selama 3:31(3 min 31 saat).

(iii) Eksibit 'LCY-Comm2018-4' iaitu perbualan whatsapp antara Responden dan Pempetisyen bertarikh 1 Julai 2017.

(iv) Eksibit 'LCY-Comm2018-10' iaitu Nota Keterangan bertarikh 3 Januari 2018.

[15] For paras (i) and (ii) above, learned counsel for RW submitted that on 25 June 2017 there was no evidence taken from the said children that RW took them to the mosque. By referring to the conversation PH had with Rou (exh LCY-Comm2018-3), shows that the conversation that led to the conclusion by PH that RW brought the said children to the mosque was not on 25 June 2017. Learned counsel submitted that 25 June 2017 was not the second day of Raya and there is no Raya prayer at the mosque (or at any mosque for that matter) on second day of Raya. This support the submission by learned counsel of RW that the conversation PH had above was in fact referring to the event in 2016 (grounds for the first committal proceeding in encl 160 against RW). Based on the notes of proceedings in court, RW had never admitted that she has brought the children to the mosque or for Rou to wear the hijab on that day.

[16] For charges 6 and 7, learned counsel for RW argued that from the log history, there was no phone call and for the WhatsApp messages it shows the call made by PH was on 8 July 2017 and not 7 July 2018 and based on that charge 6 ought to be dismissed. The same scenario with the call on 14 October 2018, where from the log history it shows that Rou did return PH's call on 8.24pm and there was a call drop affecting the quality of the call because they were on the highway on the way home. In fact, RW called PH when they reached home at 8.38pm which call was not denied by PH. Based on the above, learned counsel for RW submitted that PH had failed to prove that RW had in fact committed breach of the order given by this court on 6 June 2016.

THE LAW

Enclosure 191 (stay application)

[17] It is trite law that court has the absolute and unfettered discretion to grant stay of execution if there are special circumstances and it is also trite that an appeal to the Court of Appeal does not constitute special circumstances for the granting of stay.

Enclosure 203 (cross-examination of RW's affidavits)

[18] The discretionary power of the court to order cross-examination of the deponent's affidavits can be exercised pursuant to O 38 r 2 and O 92 r 4 of the

ROC 2012. There are many factors to be considered in determining an application for cross-examination. One of the pertinent considerations in exercising the discretion is for the court to necessarily see how the proposed cross-examination would be relevant to the issue in the petition.

Enclosure 169 (committal proceeding)

[19] The court may, on the application of any party to any cause or matter or on its own motion, make an order of committal in Form 107 (O 52 r 2 of the ROC 2012). The courts' jurisdiction to issue an order for committal is derived from the Federal Constitution, art 126 and the Courts of Judicature Act 1964 (Act 91), s 13. The rules governing procedure in committal proceedings are as set out in O 52 r 3 of the ROC 2012 which deals with contempt in connection with both civil and criminal proceedings.

[20] An order of committal will only be made where no other recourse is available. Where a reasonable alternative is available instead of committal to prison, that alternative must be taken.

[21] The object of the law of contempt is not to protect judges and their dignity but to protect the rights of the public by ensuring that the administration of justice is not obstructed or prevented. To constitute contempt of court, there must be some 'act done, or writing published calculated to bring a court or judge of the court into contempt or to lower his authority' or 'calculated to obstruct or interfere with the due course of justice or the lawful process of the courts' (see *Perera v R* [1951] AC 482 (PC)). Conduct that tends to bring the authority and administration of the law into disrespect or disregard, or interferes with or prejudices parties, litigants or their witnesses during litigation is generally what constitutes contempt of court. It is an act of interference with the due administration of justice.

FINDINGS OF THIS COURT

Enclosure 191 (stay application)

[22] It is trite law that the court has the absolute and unfettered discretion to grant stay of execution if there are special circumstances and it is also trite that an appeal to the Court of Appeal does not constitute special circumstances for granting stay. Based on the above mentioned, this court finds that PH had not put forward any reasons which relates to the enforcement of the judgment. In his affidavits in support of this application he merely focused on the merits of his appeal. I agree with the submission of learned counsel for RW that the issues raised by PH in his affidavits in support regarding the merits of this appeal does

not constitute special circumstances. Regarding the matrimonial home, the issue of nugatory does not arise because by the court's decision PH still holds 50% undivided share of the matrimonial home and he is given the option to purchase RW's 50% undivided share in the said property. I refer to *Kosma Palm Oil* which held as follows:

> The onus is on the applicants to demonstrate the existence of special circumstances to justify the grant of a stay of execution. The reasons must relate to the enforcement of the judgment. They must be deposed in the affidavit filed in support of the application.

Based on the above I am of the view that PH had failed to raise any issue that amounts to special circumstances needed for the stay application and therefore this application was dismissed with no order as to cost.

Enclosure 203 (Cross-examination of RW's affidavits)

[23] The discretionary power of the court to order cross-examination of the deponents of affidavits can be exercised pursuant to O 38 r 2 and O 92 r 4 of the ROC 2012. There are many factors to be considered in determining an application for cross-examination. One of the pertinent considerations in exercising the discretion is for the court to necessarily see how the proposed cross-examination would be relevant to the issue in the petition. In *Emporium Jaya (Bentong) Sdn Bhd v Emporium Jaya (Jerantut) Sdn Bhd (No 2)* [2002] 5 MLJ 675; [2002] 3 CLJ 10, Ramly Ali J (as His Lordship then was) stated as follows:

> In order to enable me to exercise my judicial discretion as regards the present applications made by the applicants in the present case, it is necessary for me to see how the proposed cross-examination of this issue is therefore essential in order to enable me to determine whether the applications are made 'without just cause, or motivated by desire to delay proceedings or without bona fide or sham or vexatious.

[24] In *Tetuan Kumar Jaspal Quah & Aishah (suing as a firm) v The Co-Operative Central Bank Ltd* [2007] 4 MLJ 638; [2007] 4 CLJ 48, Court of Appeal amplified the important factors to be considered by stating that there must be a conflict in affidavit evidence in respect of the identified issue(s) to necessitate a cross-examination of a deponent.

[25] It is my considered view that PH ought not to have relied upon the questions or issues raised by this court during the trial to justify their applications herein. PH must be able to identify the relevant issues and/or factual disputes which would warrant cross-examination of RW. PH did not identify which averment or factual disputes in the affidavit evidence of RW that PH is seeking to challenge that warrant the cross-examination of RW. In *Tetuan Kumar Jaspal Quah & Aishah*, the Court of Appeal stated:

A Merely believing that there are material discrepancies between facts deposed in the said affidavit and what actually happened does not challenge the truth of any fact therein stated nor does it identify any dispute that could be resolved by cross-examination. As such there is nothing to necessitate cross-examination.

B Further it is my considered view that there will be a hearing for committal proceeding and RW can be cross-examined then and consequently I find no necessity for RW to be cross-examined at this stage of the proceeding.

Enclosure 169 (committal proceeding)

C

[26] The issue before this court is whether RW had in fact committed contempt by an alleged breach/disobedience of an ad interim order dated 6 June 2016 that is duly endorsed with a penal clause under O 45 r 7(4) pending the disposal of the divorce petition. The two children, female (9+ years
D old) and male (5+ years old) are alleged by the applicant husband:

(a) to have been taken by the respondent to the mosque for prayers during Raya, ie on 25 June 2017; and

(b) causing the daughter to wear the hijab on 25 June 2017; and
E

(c) failure to allow access by electronic communication from 7–8pm on 7 July 2017 and 14 October 2017.

[27] For committal proceeding RW was cross-examined by learned counsel
F for PH on 16 August 2018. What the court must consider is based on the evidence before it and to judicially determine whether there is enough material of probative value in totality adduced by PH to support the allegations of contempt against RW beyond reasonable doubt. Clear proof must be adduced to satisfy the required threshold of burden of proof that the alleged contemnor
G had indeed breached the terms of the court's order. There is no room for implication. Proof by implication of facts alone would be unlikely to satisfy the required burden. Any argument based merely on implication of certain facts finds no place in contempt proceedings. It is also trite that any doubt arising on the allegations of contempt, the benefit of the said doubt must be given in
H favour of the respondent. Where there is more than one inference that can be drawn from the facts, the inference favourable to the accused should be adopted. Anchored on the foregoing principles of law on contempt, I had perused the respective affidavits of the parties, the said ad interim order and after looking at the reply by RW and the evidence given by RW in court (during
I committal proceeding) as to the allegations made against her, I am not convinced as to her guilt. Committal is a serious proceeding as the outcome could and would affect the liberty of the alleged contemnor.

[28] There is no clear proof that she had done what she is alleged to have

done to the total disregard of the ad interim order or to bring the administration of justice into disrepute. Other than presenting the alleged implications of the facts and circumstances of the case, PH had not been able to adduce any other pertinent material of probative value to prove his allegations and consequently, such omission would impair the satisfaction of the required burden of proof imposed on the PH concerning his allegations against the RW. I find the explanation/averment in the RW's affidavit as sufficient in the circumstances to create doubt in my mind as to her guilt. I find no plausible reason to hold RW dishonouring the terms of the ad interim order based on the materials presented by PH before me. I agree with the submission of learned counsel for RW that the conversation PH had with his children were referring to the incident in 2016 and not 2017. Furthermore, PH cannot rely on the conversation he had with his children and mount these charges (1–5 charges) against RW as the rule of evidence dictate that there must be corroboration with evidence of child of tender years. The repetitious way PH had asked the children the same question whether they went to the mosque on second day Raya (refer exh 'LCY-Comm2018–3') can be safely considered in the circumstances of the case as coaching the children in regard to the issue as contained in the said question. In any event it is to be noted that RW and the children had denied that they went to the mosque. PH had also relied on the evidence of RW in open court which admitted that she went to the mosque with the children in 2017 during Raya but during cross she denied that she went to the mosque with the said children on that day. During committal proceeding, RW gave evidence in open court that she did not take the said children to the mosque in 2017 because during that Raya the children were with PH and she went to the mosque with her neighbour. Although it was put to RW that the testimony that she went to the mosque with her neighbour was not stated in the affidavit is not in my considered view detrimental to RW because the fact that the said children was not with her during Raya 2017 was not cross-examined further and it is deemed accepted as the truth. Therefore, in the premise, I hold that PH had failed to prove his allegations beyond reasonable doubt as required by law. With the benefit of doubt given to RW, I thereby dismissed the application for contempt.

CONCLUSION

[29] In light of the foregoing and after closely scrutinising the applications and examining all evidence adduced before me, I dismissed PH's application encl 169 (committal proceeding), encl 203 (cross-examination of RW's affidavit/s) and encl 191 (stay application) with no order as to cost.

Enclosures 169, 203 and 191 dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar